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THE ANTHRACITE COAL INDUSTRY AND THE BUSINESS AFFECTED WITH A PUBLIC INTEREST

THE constitutions, state and federal, do not anywhere guarantee any absolute property rights nor right to liberty. The guarantee is merely that no person shall be deprived of life, liberty and property without due process of law. The right to liberty and property was never absolute under the English law, and the American constitutions have never been construed as going further than guaranteeing the continuance of the rights which existed at the time of their adoption.¹

The doctrine expressed by the maxim "*salus populi suprema est lex*," indeed, expresses an underlying principle both of the common law of England and of the constitutional law of the United States. Subject to it all property is owned and controlled and all property rights exist, and subject to it the American constitutions themselves may be said to have been ratified and adopted. The principle just expressed does not stop at merely justifying the destruction of tangible property in certain instances where the further existence of the same threatens injury to the public, as in the case of the razing of buildings and other property to prevent the spread of a conflagration, or the summary destruction of property which has come within the definition of a nuisance *per se*, but extends to the control of property rights and the limitation of their enjoyment, in obedience to the broad idea that the ultimate good of the community as a whole is

¹This can hardly be said to have been the case with the guarantees of religious liberty contained in the so-called American Bill of Rights and in the various state constitutions. Religious liberty was hardly known before the adoption of the American Constitution.

the underlying principle of all government and of the governmental sanction and recognition of any property rights in the individual at all. We may almost say that the right to the private ownership of property has only been recognized by the law because the existence of such a right has been deemed most beneficial to the community as a whole. It is now and has been for a long time conceded among the English speaking peoples that in the majority of instances as near an approach to absolute private ownership and control as is possible is the best public policy, and that by it self respect is stimulated and enterprise, thrift and love of country engendered. But there always have been and always will be cases where different considerations apply, and where a governmental limitation on this right has been and always will be deemed to contribute more to the welfare of the state than unlimited freedom. This for a long time has been held to be the case where private property or the right to use or control the same has been or is affected with a public interest. It then ceases to be *juris privati* only. Property becomes clothed with a public interest when it is used in a manner to make it of public consequence and to affect the community at large.² It is true that originally the class idea largely prevailed in the law of England, and that this feudal theory, coupled with the natural selfishness of the dominant military aristocracy, occasioned the earlier restrictions and limitations to be imposed almost entirely upon the lower and laboring classes. But this was and only could be for a limited time. As the democratic idea grew and the state became more and more commercial and less and less military, the classes affected were extended and the principles and theories by which the rich and powerful sought to justify their control over the *serving* poor afforded the justification for the control of the rich when they in turn came to be, as in the case of our great railroad magnates of today, the carrying and serving agencies of the community. There can be but little doubt that the carter and the pack mule owner and the ferryman, who were the original common carriers, were at first regulated because they were "poor devils." This was no doubt also true of the inn keeper, the baker and the laborer generally. But these persons were none the less engaged in necessary and often almost monopolistic public callings and their regulation redounded to the good of the majority of all classes. They, too, held their landed possessions from their lords and relied upon their lords for protection from highway robbers and their other enemies. This protection was especially necessary to the common carrier, whose

²Munn v. Illinois, 94 U. S. 113.

route often lay over wild and robber infested highways and by-paths. It is also quite probable that there was a mediæval and a feudal philosophy beneath it all, and that the aristocracy who imposed the regulations argued that they themselves had their duties to perform in the social organism, the duties of free military service to their sovereign and of protection to their tenants and retainers, and that their liberties were also restricted only in another way. They no doubt argued that there was, or should be, a social duty on the part of those who could only labor and carry to serve them and the public for a reasonable rate and in a reasonable manner, the same as there was upon themselves, the fighters, to don their armor when called upon and to follow their sovereign to battle, and to protect the poor from pillage and from robbery. The whole feudal idea, indeed, was one of public service. Service perhaps at first culminating in a landed aristocracy and in a monarch, but in a social system in which the monarch was in a large sense the state. It was but a step to substitute the popular for the personal sovereign. It was from an early time indeed insisted, that "the splendor and powers of the crown were attached to it for the benefit of the people and not for the private gratification of the sovereign," and "that the prerogatives of the crown were not given for the personal advantage of the king, but they were allowed to exist because they were beneficial to the public."³ The right of governmental regulation has always been conceded where the unrestricted use of property or of liberty has injuriously affected the health or the morals of the community. Every such business or exercise of individual or property rights is deemed to be affected with a public interest, and in such cases governmental interference and control, if at all reasonable, is and always has been justified. These are the cases in which the so-called police power of the state is usually exercised.⁴ There are other cases, however. Property becomes affected with a public interest when it is devoted to a use in which the public has an interest, a use by which the owner, in effect, grants to the public an interest. In such cases the owner must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may, in most instances, withdraw his grant by discontinuing the use; but so long as he maintains the use he must submit to the control.⁵

³CHITTY, *Prerogatives* 4; *Rorke v. Daysell*, Term. R. 410. See *Munn v. Illinois*, 94 U. S. 113.

⁴*Lake View v. Rose Hill Cemetery*, 70 Ill. 192; *Potter's Dwaris* 444. In 1229, places were fixed for the holding of markets in London; in 1306 the use of sea coal in the city was made a capital offense; in 1345 the sale of poultry in lanes and hostels was forbidden; in 1429 slaughter houses were licensed.

⁵See *Munn v. Illinois*, 94 U. S. 113.

"A man," says LORD HALE in his treatise *De Portibus Maris*,⁶ "for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for crantage, wharfage, housellage, pesage, for he doth no more than is lawful for any man to do, viz: makes the most of his own. If the King or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the Queen, or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for crantage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the King's license or charter. For now the wharf, and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest." So, too, it was said by LORD ELLENBROUGH that "there is no doubt that the general principle is never both in law and justice, that every man may fix whatever price he pleases upon his own property or the use of it. But if for a particular purpose, the public have a right to resort to his premises and make use of them and he have a monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms."⁷

It is true that Mr. JUSTICE FIELD, in his dissenting opinion in the case of *Munn v. Illinois*,⁸ takes the position that no such right of governmental control ever existed at the common law, except where the public health and morals were directly affected, or where special privileges had been granted to the person sought to be controlled. But this contention is hardly borne out by the facts. Perhaps it may more truthfully be said that in the early times special privileges were deemed to have been practically granted to all. The miller was given by his lord the right to construct his mill and to harness the waterways. And the inn keeper no doubt was given the privilege to erect his inn. Both were entitled to call upon their lords for protection, and it was the failure of this protection from the landlords which gave to Edward I. and his successors, especially the Tudors, the opportunity to entrench themselves in power. This was mainly accomplished by the invention of the standing army and, in return for the loyalty and support of the lower and middle classes and the

⁶See opinion in *Munn v. Illinois*, 94 U. S. 113; *De Portibus Maris*, 1 Harg. L. Tr. 78.

⁷*Allnut v. Inglis*, 12 East 527.

⁸94 U. S. 113.

payment by them of direct dues and taxes to the crown, the furnishing of a military protection which was better than the lords could ever have given or were in the habit of giving. When we remember how wild the country was, how difficult to traverse, how infested with brigands and highway robbers, we will realize how necessary this protection was to all trade and to all intercourse, and especially to the common carrier. Before the rise of the royal army, indeed, the free-trading cities and the trade guilds had been compelled to maintain military organizations of their own and were to a large extent the employers of the free lances and mercenaries who swarmed over Europe. It is also true that at first the supervision and control of the lower and serving classes was to a very large extent in the hands of the great landlords and it was they who came in direct contact with the masses of the people. But the statute of *quia emptores* which was designed as much to center control in the landlord as it was to make conveyances of real property easy and possible, carried the idea much further, and under the construction of Edward I. centered all control in the King, who was the source of all privileges.⁹ The theory of the origin of these rights in the state itself, and of a responsibility to the state therefor, was, as the democratic ideal grew, henceforth easy and natural. Prior to the passage of the statute in question the purchasers "of lands and tenements of the fees of great men and other lords" were able to enter "into their fees to the prejudice of the lords" and to buy "the lands and tenements from the freeholders of such great men, to hold of their feoffers and not of the chief lords of the fees; so that the chief lords "lost their escheats, marriages, and wardships of such lands and tenements, which was a grievance to the great land holders of the kingdom," who thought themselves "in a manner disherited by such defalcations in their seigniories."¹⁰ For these reasons the statute of *quia emptores* was enacted at the instance of the great land holders. It provided that in the future it should be lawful for every freeman to sell at his pleasure his land or tenements or part thereof, so that the feoffee should hold the land or tenement of the chief lord by the same services and customs by which the feoffor before held it. By this means every free holder instead of the partial permission he before had under *Magna Charta*, was at liberty to alien all his lands, provided he made a reservation of the services, not to himself but to the chief lord. This was intended to entrench the old aristocracy by putting a stop to the practice of creating new seigniories, and it

⁹See Reeve's *History of English Law*, Chap. XI.

¹⁰See preamble to act.

was intended no doubt that every tenancy in the kingdom should thereafter continue a part of the same fee or manor to which it then belonged; for if no new reservation of services could be made, no new manor could be created.¹¹ But Edward I. forced the statute much further and to its logical conclusion. He maintained that the statute could only lead to the vesting of all absolute control in himself; that he was the superior lord, and that under the feudal system all holdings were held from him. And it was in return for an acquiescence in this position by the great land holders that the privilege of primogeniture was first granted, and the landed nobility protected from their creditors of the merchant and middle classes of whom they were so jealous and so much in dread.¹² These merchant classes, however, were all the recipients of royal charters and royal favors; they were the inhabitants of the free burghs and the members of the trade guilds.¹³

There is, therefore, nothing illogical or inconsistent in our modern theories concerning the right of governmental regulation. We have merely applied a little more reason in the matter, and based the right of regulation not on a foundation of power and selfish interest, but on one of general necessity. We have retained in America enough of the individualism of the frontier and of our Norse and

¹¹See Reeve's *History of English Law*, Chap. XI.

¹²It was the Statute of Merchants enacted by Edward I. himself which had given to this class its powers. Prior to this time its members had no means by which to enforce their claims and the lord and large landed proprietors could repudiate their debts at will. Now the courts of the country were opened to the merchant and the royal power placed behind the mandates of these courts so that judgments could be collected. It is indeed from the time of the passage of the Statute of Merchants that we begin to trace the real rise in power of the English middle class and the growth of English middle class parliamentary government. It was not long before the King and the middle classes (who had the money and could pay the taxes) dominated everything. Henry VII, Henry VIII, and Elizabeth ruled for and through these classes. Charles I, was beheaded, and James II, was deposed for not catering to them, and ever since they have been the dominant classes in the Kingdom. The aristocracy have, it is true, officered the army and the navy, but the army and the navy were in their origin and present day use royal agencies which were organized for the protection of trade and of the middle classes as much as for the purpose of entrenching in power the monarch himself. These were the agencies which as we have before seen took from the hands of the old landlord the duty and the power of police protection and vested it in the state itself.

¹³The right to trade was in England from an early time everywhere hedged around with restrictions and was frequently the subject of royal charters. Even, the public fairs, where most of the trading was originally done, were generally held under these charters or grants, the grantees of the privileges in turn being empowered to license and to control. As early as the reign of William II, we read of a royal charter being given to the Bishop of Winchester to hold a fair on his domains, the grant being coupled with the duty of police regulation and control and the right to charge a toll on all goods sold. The sale of goods anywhere else in Winchester was for the time at least forbidden. In the reign of Edward VI, it was made a criminal offense to buy goods which were on their way to a market or to buy corn or other dead victual in any market and to sell it again in any other market.

Anglo-Saxon forefathers to base all right of regulation on this ground of necessity and of basic reasonableness, and though conceding the full power, where the necessity exists, to deny it when that necessity is not apparent. We have, however, retained enough of the collectivism of feudalism to recognize the needs and the rights of the community as a whole and of the state, which is nothing more nor less than the community.

As our population increases and the struggle for existence grows keener and keener, the necessity for governmental regulation will become more and more apparent and its field will become more and more expanded. It is now generally conceded that not merely the health, safety, comfort and morality of the public are matters of governmental solicitude, but its convenience and welfare generally, and that, though the right to liberty and property cannot be interfered with unreasonably and competition is the desideratum of the law, where competition is suppressed, either naturally or artificially, interference and regulation may be resorted to. Where, indeed, a practical monopoly is created or exists in a business, that business, if at all necessary to the public, is to that extent deemed to be affected with a public interest. It is not sufficient, however, to justify such regulation to show merely that a monopoly exists. It must actually and necessarily exist. An adequate opportunity to contend against the monopoly must be wanting. If a sewage or water company has the exclusive use of the streets of a city the business is affected with a public interest, for, in the nature of things, one must gain a connection with such sewer or water supply, or go without. One grocery store in a town is not, however, such a business, as others may easily be started.¹⁴ Neither is the mere fact that the public has an interest in the business sufficient in itself; for in what business has the public not an interest? The doctor, for instance, need not minister to all who require his services, and yet he solicits the patronage of all and is a necessary social factor.¹⁵ His business is affected with a public interest in so far as the public is interested in his competency and can insist upon his proper training and education,¹⁶ and hold him liable in an action of trespass for his negligence as for a breach of a public duty. Doctors, however, are at present so numerous, competition so strong, and the tendency to unionize, if existing, comparatively so harmless, that the right to regulate prices could hardly be insisted upon. Where unions exist, however, whether of doctors, of lawyers, of merchants or of laboring men, and

¹⁴*Brewster v. Miller*, 101 Ky. 275.

¹⁵*Hurley v. Huddingfield*, 156 Ind. 416.

¹⁶Y. B. 19 H. VI, 49, 5; Y. B. 43 Ed. III, 6 pl. 11; *Slater v. Baker*, 2 Wils. 359.

are generally adhered to, and the prices exacted are extortionate, or the union is of such a strength that the prices may become extortionate, the right to regulate is established. The statutes of laborers of England were passed under such conditions. The labor market at the time was monopolized and regulation was the result. At the time of the revolution selfish and unpatriotic attempts on the part of many to make an exorbitant profit out of the necessities of the troops in the field and of the life-struggle of the colonies, led to the passage of statutes in New York and Massachusetts which fixed the scale of wages for farm laborers, mechanics and teamsters and the scale of prices for various commodities. These statutes, even if passed after the adoption of the American constitution, would no doubt have been upheld, as the businesses were essentially affected with a public interest, and by creating a monopoly and controlling prices, public regulation had been invited.

We are today extending the field of governmental interference, and businesses and occupations which were formerly unknown or of little importance are now being regulated and their charges controlled. The police powers of a state must necessarily be elastic in their nature, and be as extensive as the wants and ideals of the community; and businesses and occupations which were formerly of little importance may, as time goes on, become necessary to the community. When they become necessary and liable to become monopolies, the right of regulation exists. To this class now undoubtedly belong electric light companies operating upon the public streets,¹⁷ railroad bridge companies,¹⁸ telephone and telegraph companies,¹⁹ water companies,²⁰ sewerage companies,²¹ irrigation and canal companies.²² So, too, the rapid development and importance of the grain elevator or warehouse business, and the building up therewith and in conformity with its requirements and conveniences of the American grain raising industries, have induced the courts of recent years not only to sustain statutes which regulate the charges of such institutions, but which place them in the category of common carriers, compel them to accept the goods of all who may apply as long as they have room, and even to insure the grain stored

¹⁷*Gould v. Electric Light Company*, 60 N. Y. Supp. 559.

¹⁸*Canada Railway v. International Bridge Company*, 8 App. Cas. 723.

¹⁹*State v. Telephone Company*, 17 Neb. 126.

²⁰*Haugen v. Albina Water Company*, 21 Ore. 111; *City of Tampa v. Waterworks Company*, 34 South. 631.

²¹*Mobile v. Water Supply Company*, 130 Ala. 379.

²²*Wheeler v. Irrigation Company*, 10 Col. 582.

with them at their own expense.²³ Not merely have the courts of recent years justified the regulation of prices and interference with private industry for the protection of the public against extortionate rates, but the regulation in a large measure by law of the rates of wages, or, at any rate, of the method by which wages shall be paid in order to preserve tranquility in particular industries.²⁴ It has even been held that where the conduct of any business tends to disturb the public peace, and its owners are constantly calling upon the public for protection, the business to that extent becomes affected with a public interest. This was the case in the mines of Tennessee and Virginia.²⁵ This could well be the case in the anthracite mines of Pennsylvania.

These latter cases are of great importance and significance and full of suggestion for the future, for there never has been a time in the history of the country when the business world has been so closely articulated. The breaking of one link in the chain, indeed, often completely paralyzes the whole system. The business stagnation which resulted from the so-called Debs strike and that which resulted from the strike in the anthracite coal fields of Pennsylvania are fresh in our memories even today. The strike which is again threatened in those fields, and the sympathetic or secondary strikes which are not only threatened in the bituminous fields but on the

²³*Munn v. Illinois*, 94 U. S. 113; *People v. Budd*, 117 N. Y. 1; *State v. Brass*, 2 N. D. 482; *Brass v. North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857.

A vigorous protest has been made against the later case of *Brass v. North Dakota* which sustains a statute when directed not merely against terminal elevators, as was the case in *Munn v. Illinois*, but against the ordinary country elevator. It is urged that in the later case there is no necessary monopoly, and that every farmer, or combination of farmers can at a little cost, erect its own elevator. It was on this ground that Mr. Justice MILLER and Mr. Justice BRADLEY, who concurred in the majority opinion in the leading terminal elevator case of *Munn v. Illinois*, dissented from the opinion in *Brass v. North Dakota*, and which held it competent to regulate the charges of elevators generally. He maintained that in the terminal elevator system in Chicago, there was a practical monopoly, as such elevators were not merely terminal elevators, but the high price of land and the difficulty of access to the railroad tracks made competition almost impossible. These considerations he held did not apply to the country elevators. "If this be a monopoly, justifying public control of prices for service," said Mr. Justice BREWER, "I am at a loss to perceive at what point the fact of monopoly will cease and freedom for business commence, for obviously elevators along that line of road were as plentiful as other institutions of industry and as easily and cheaply conducted, and therefore, savoring no more of monopoly." And there seems to be much of reason in this dissent. Modern events have, however, shown the ease with which such businesses can be monopolized, the real lack of an aggressive competition, and the dependence of the public upon the elevator industry. Since the decision in the merger cases indeed it seems to have been settled that the power and ability to monopolize is the criterion and not the actual fact of monopolization.

²⁴See *Peel Splint Coal Co. v. State*, 36 W. Va. 802; *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1; *Dayton Coal Co. v. Barton*, 183 U. S. 23, 22 Sup. Ct. 5.

²⁵See *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1.

railroads and in the other branches of labor, and which are quite certain to follow, bring before us once more the question of the right of the public as a whole in the control of the industries which flourish under its protection. Are our laws and is our constitution such, and is the history of our legal and national growth of such a nature, that we as a people must sit idly by and be content merely to keep the peace or to see that the battle is fought under Marquis of Queensberry rules? To what extent does American individualism extend? Is there any legal foundation for the statement so often made by the business man, that his business is his own and he has the right to run it as he pleases? Is the right of the laboring man to strike a right which is inalienable?

Prior to the year 1892 there was in America but one answer to these questions. It was to be found in the case of *Godcharles v. Wigeman*²⁶ and in a long line of decisions which followed its reasoning.²⁷ In it and in the other opinions mentioned the right of legislative bodies to regulate the terms of employment between master and servant, except in cases when one of the parties was a minor or a sailor or a woman who had not been granted the privileges of the married woman's acts, and except perhaps in the cases where health and life were directly affected, was vigorously denied, and statute after statute which sought to so regulate was set aside either on the ground of class legislation or because it appeared to the courts to be unreasonable and a denial to the persons affected (both employers and employees) of liberty and property and of due process of law. "There can be no doubt," said the supreme court of Missouri in the case of *State v. Loomis*,²⁸ "but the legislature may regulate the business of mining and manufacturing so as to protect the health and safety of the employees, but that is not the scope of the two sections of the statute now in question. They single out those persons who are engaged in carrying on the pursuits of mining and manufacturing, and say to such persons, 'You cannot contract for labor payable alone in goods, wares and merchandise. The farmer, the merchant, the builder, and the numerous contractors, employing thousands of men, may make such contracts, but you cannot.' They say to mining and manufacturing employees: 'Though of full age, and competent

²⁶113 Pa. St. 431, 6 Atl. 354, decided in 1886.

²⁷*State v. Goodwill* (1889), 33 W. Va. 179, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188, 10 S. E. 288; *State v. Loomis* (1893), 115 Mo. 307, 22 S. W. 350; *Millett v. People*, 117 Ill. 294; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380; *Low v. Rees Printing Co.*, 41 Neb. 127, 59 N. W. 362; *Ritchie v. People*, 155 Ill. 99, 40 N. E. 454; *In re House Bill No. 203*, 21 Col. 27, 39 Pac. 431; *In re Eight Hour Bill*, 21 Col. 29, 39 Pac. 328; *In re Morgan*, 26 Col. 415, 58 Pac. 1071.

²⁸115 Mo. 307.

to contract, still you shall not have the power to sell your labor for meat and clothing alone, as others may.' It will not do to say that these sections simply regulate payment of wages, for that is not their purpose. They undertake to deny to the persons engaged in the two designated pursuits the right to make and enforce the most ordinary, every-day contracts—a right based upon a classification which is purely arbitrary, because the ground of the classification has no relation whatever to the natural capacity of persons to contract. Now, it may be that instances of oppression have occurred and will occur, on the part of some mine owners and manufacturers, but they occur quite as frequently in other fields of labor. Conceding that such instances may and do occur, still that furnishes no reasonable basis for depriving all persons engaged in the two lawful and necessary pursuits of the right to make and enforce every-day contracts. Liberty, as we have seen, includes the right to contract as others may, and to take that right away from a class of persons following lawful pursuits is simply depriving such persons of a time-honored right which the constitution undertakes to secure to every citizen." While in the case of *Godcharles v. Wigeman* ²⁹ the supreme court of Pennsylvania went still further and said that an act of the kind in question "is an infringement, both of the rights of the employer and the employee. It is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or his coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges and consequently void."³⁰

²⁹113 Pa. St. 431, 6 Atl. 354.

³⁰In the same strain the Supreme Court of West Virginia, in the earlier case of *State v. Goodwill*, 33 W. Va. 179, which, however, is now practically overruled by the case of *Peel Splint Coal Co. v. State*, 36 W. Va. 802, said: "It is a species of sumptuary legislation which has been universally condemned as an attempt to degrade the intelligence, virtue and manhood of the American laborer and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a tyrant and the employee is an imbecile." While the Supreme Court of Colorado, in the case of *In re Morgan*, 26 Col. 415, 58 Pac. 1071, went even further and denied the right of legislative interference altogether in the matter of contract between employer and employee even though the health of the latter was directly concerned. "The only object that can rationally be claimed for the act," the court said, "is the preservation of the health of those working in the smelters. Were the object of the act to protect the public health and its provisions reasonably appropriate to that end, it might be sustained; for in such a case even the constitutional right of contract may be reasonably limited. But the act before us is not of that character. In selecting a subject for the exercise of the police power, the legislature must keep within its true scope. The reason for the existence of the power rests upon the theory that one must so use his own as not to injure others, and so as not to interfere with or injure others, and so as not to interfere with or

These cases were for a time everywhere followed. It was not until 1892 and 1899 respectively, that the supreme courts of West Virginia³¹ and Tennessee³² made a complete change of front and took a radically different position, and not until 1901³³ that the supreme court of the United States sustained them in so doing. "The whole is not greater than the sum of all its parts, and when the individual health, safety and welfare are sacrificed or neglected the state must suffer" the latter court had already said in sustaining a statute of Utah which regulated the hours of labor in underground mines.³⁴ In the case of *Knoxville Iron Co. v. Harbison*³⁵ it went still further and, in sustaining the judgment of the supreme court of Tennessee to which we have referred, quoted with approval the following language of its opinion: "Confessedly, the enactment now called in question is in all respects a valid statute and free from objection as such, except that it is challenged as an arbitrary interference with the right of contract, on account of which it is said that it is unconstitutional and not the law of the land or due process of law. The act does, undoubtedly, abridge or qualify the right of contract, in that it requires that certain obligations payable in the first instance

injure the public health, safety, morals, or general welfare. How can one be said injuriously to affect others, or interfere with these great objects, by doing an act which confessedly visits its consequences on himself alone? And how can an alleged law, that purports to be the result of an exercise of the police power, be such in reality, when it has for its only object, not the protection of the others, or the public health, safety, morals, or general welfare, but the welfare of him whose act is prohibited, when, if committed, it will injure him who commits it, and him only? The maxim does not read, 'So use your own right or property as not to injure yourself or your own property' * * * . Our bill of rights expressly says that government is instituted solely for the good of the whole."

But of these opinions and this conception of public morality, the Supreme Court of the United States in the case of *Holden v. Hardy*, 169 U. S. 366, in its turn said: "It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently under the statute is the only one liable, his defense is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer."

³¹*Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000.

³²*Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 53 S. W. 955; *Dayton Coal & Iron Co. v. Barton*, 103 Tenn. 604, 53 S. W. 970.

³³*Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1; *Dayton Coal Co. v. Barton*, 183 U. S. 23, 22 Sup. Ct. 5.

³⁴*Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383; see also *St. Louis I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419.

³⁵22 Sup. Ct. 1.

in merchandise shall in certain contingencies be paid in money; yet it is as certainly general in its terms, embracing equally every employer and employee who is or may be in like situation and circumstances, and it is enforceable in the usual modes established in the administration of government with respect to kindred matters. The exact and precise requirement is *that all employers, whether natural or artificial persons, paying their employees in 'coupons, script, punchouts, store orders, or other evidences of indebtedness,' shall redeem the same at face value in money, if demanded by the employee or a bona fide holder on a regular pay day or at any time not less than thirty days from issuance and that, if payment be not so made upon such demand, the owner may maintain a suit on such evidence of indebtedness, and have a money recovery for the face value thereof, in any court of competent jurisdiction.* There is no prohibition against the issuance of any of the obligations referred to, nor against payment in merchandise or otherwise according to their terms, but only a provision that they shall be paid in money at the election and upon a prescribed demand of the owner. In other words, the effect of the act is to convert into cash obligations such unpaid merchandise orders, etc., as may be presented for money payment on a regular pay day or as much as thirty days after issuance. Under the act the present defendant may issue weekly orders for coal, as formerly, and may pay them in that commodity when desired by the holder, but instead of being able, as formerly, to compel the holder to accept payment of such orders in coal, the holder may, under the act, compel defendant to pay them in money. In this way and to this extent the defendant's right of contract is affected. Under the act, as formerly, every employee of the defendant may receive the whole or a part of his wages in coal orders, and may collect the orders in coal, or transfer them to some one else for other merchandise or for money. His condition is bettered by the act, in that it naturally enables him to get a better price for his coal orders than formerly, and thereby gives him more for his labor; and yet, although the defendant may not in that transaction realize the expected profit on the amount of coal called for in the orders, it in no event pays more in dollars and cents for the labor than the contract price. The scope and purpose of the act are thus indicated. The legislature evidently deemed the laborer at some disadvantage under existing laws and customs, and by this act undertook to ameliorate his condition in some measure by enabling him or his bona fide transferee, at his election and at a proper time, to demand and receive his unpaid wages in money rather than in something less

valuable. Its tendency, though slight it may be, is to place the employer and employee upon equal ground in the matter of wages, and, so far as calculated to accomplish that end, it deserves commendation. Being general in its operation and enforceable by ordinary suit, and being unimpeached and unimpeachable upon other constitutional grounds, the act is entitled to full recognition as the 'law of the land' and 'due process of law' as to the matters embraced, without reference to the state's police power, as was held of an act imposing far greater restrictions upon the right of contract, in the case of *Dugger v. Mechanics' & T. Ins. Co.*, 95 Tenn. 245, 28 L. R. A. 796, 32 S. W. 5, and as had been previously decided in respect of other limiting statutes therein mentioned. 95 Tenn. 253, 254, 28 L. R. A. 799, 32 S. W. 6, 7. Furthermore, the passage of this act was a legitimate exercise of police power, and upon that ground also the legislation is well sustained. The first right of a state, as of a man, is self protection, and with the state that right involves the universally acknowledged power and duty to enact and enforce all such laws, not in plain conflict with some provision of the state or federal constitution, as may rightly be deemed necessary or expedient for the safety, health, morals, comfort, and welfare of its people. The act before us is, perhaps, less stringent than any one considered in any of the cases mentioned. It is neither prohibitory nor penal; not special, but general; tending towards equality between employer and employee in the matter of wages; intended and well calculated to promote peace and good order, and to *prevent strife, violence, and bloodshed*. Such being the character, purpose, and tendency of the act, we have no hesitation in holding that it is valid, both as general legislation, without reference to the state's reserved police power, and also as a wholesome regulation adopted in the proper exercise of that power."

Perhaps, however, the real reasons for these decisions and the reasons which will appeal with the greatest force to the public as a whole are those which are contained in the opinion of the court in the case of *Peel Splint Co. v. State*,³⁶ which was decided about the same time and in which the supreme court of West Virginia said: "We base the decision in this case. First, upon the ground that the defendant is a corporation in the enjoyment of unusual and extraordinary privileges which enables it and other similar associations to surround themselves with a vast retinue of laborers, who need to be protected against the fraudulent or suspicious devices in the weighing of coal or payment of wages for labor; Secondly, the

³⁶36 W. Va. 802.

defendant is a licensee, pursuing a vocation which the state has taken under its general supervision for the purpose of securing the safety of employees, by ventilation, inspection and government report, and the defendant, therefore, must submit to such regulations as the sovereign thinks conducive to public health, public morals and public security. We do not base this decision so much upon the ground that the business is affected by the public use, but upon still higher ground, that the public tranquility, the good and safety of society, demand, where *the number of employees* is such that specific contracts with such laborers would be *improbable*, if not *impossible*, that in general contracts justice shall prevail as between operator and miner; and, in a company's dealings with a multitude of miners with which the state has by special legislation enabled the owners and operators to surround themselves, that all opportunities for fraud shall be removed. *The state is frequently called upon to suppress strikes; to discountenance labor conspiracies; to denounce boycotting as injurious to trade and commerce; and it cannot be possible that the same police power may not be invoked to protect the laborer from being made the victim of the compulsory power of that artificial combination of capital which special state legislation has originated and rendered possible.* It is a fact worthy of consideration and one of such historical notoriety that the court may recognize it judicially, that every disturbance of the peace of any magnitude in this state since the civil war has been evolved from the disturbed relations between powerful corporations and their servants and employees. *It cannot be possible that the state has no police power adequate to the protection of society against the re-occurrence of these disturbances*, which threaten to shake civil order to its very foundations. Collisions between the capitalist and the working man endanger the safety of the state, stay the wheels of commerce, discourage manufacturing enterprise, destroy public confidence and at times throw an idle population upon the bosom of the community."³⁷

The significance of these cases, and of the judicial change of front and public policy in them expressed is very great. In them is an assertion of the rights of the independent public which in labor disputes have heretofore been too often ignored. They, it will be seen, would justify the state of Pennsylvania and the sister states in which sympathetic strikes are being inaugurated, in settling the controversies by legislative action. In other words, when the contestants are not able to settle their controversies between themselves, and the

³⁷The reasoning of this case was affirmed and its language quoted with approval by the Supreme Court of the United States in the case of *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1.

public peace and welfare are being jeopardized, in stepping in and prescribing the rules and regulations under which the industries shall be conducted. They sanction not, it is true, a compulsory arbitration, but the prescribing by the state legislatures the rules which shall control in the conduct of the businesses. The matters which were in dispute in the coal fields of West Virginia and Tennessee were, to all intents and purposes, the same matters as those which were in dispute in the recent anthracite coal strike in Pennsylvania, and in the strike which is now threatened. They were disputes over the method of weighing coal, the method of paying wages and the paying of such wages in orders on the company's stores or truck-shops. In the opinions the courts take the broad position that every business man and every man who seeks the protection of society in order that he may live and do business, and who calls upon that society for protection from physical harm and upon its courts for the enforcement of his contracts, must be willing to yield to that society some measure of regulation and control when that control is necessary for the preservation of the public peace and the public welfare. This is socialism no doubt—or looks like it, but “it is the way they have in West Virginia and Tennessee” and in the supreme court of the United States itself. It was Professor Dicey, was it not, who recently said: “We all of us in England still fancy at least that we believe in the blessings of freedom, yet, to quote an expression which has become proverbial, ‘Today we are all of us socialists.’”³⁸

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³⁸“The Combination Laws as Illustrating the Relations Between Law and Opinion in England during the Nineteenth Century,” 17 *Harv. L. Rev.* 552.